

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

**STANLEY HAWKINS AS  
INDEPENDENT EXECUTOR OF THE  
ESTATE OF ELIZABETH PAIGE  
HAWKINS, AND LACY MCKEE,**

*Plaintiffs,*

**vs.**

**NEXION HEALTH MANAGEMENT,  
INC., NEXION HEALTH AT BOGATA,  
INC. D/B/A REGENCY HEALTHCARE  
AND REHABILITATION CENTER AT  
RED RIVER AND NEXION HEALTH  
LEASING, INC. AND NEXION HEALTH  
OF TEXAS, INC.,**

*Defendants.*

**CIVIL ACTION NO. 5:13-CV-121**

**MOTION TO DISMISS OF DEFENDANTS  
NEXION HEALTH LEASING, INC., NEXION HEALTH  
OF TEXAS, INC., AND NEXION HEALTH, INC.**

TO THE HONORABLE COURT:

Defendants Nexion Health Leasing, Inc., Nexion Health of Texas, Inc., and Nexion Health, Inc. (collectively, “Defendants”), file this Motion to Dismiss in accordance with Federal Rule of Civil Procedure 12(b) in response to Plaintiffs’ Original Complaint:

## I. THE CLAIMS

1.1 Plaintiffs bring a health care liability claim per Chapter 74 of the Texas Civil Practice & Remedies Code alleging nursing home professional negligence/malpractice. However, Plaintiffs fail to state a claim against Defendants upon which relief can be granted as Plaintiffs fail to allege that Defendants are a “Health care provider” as defined by Texas Civil

Practice & Remedies Code § 74.001(a)(12)(A) or a “Nursing home” per Texas Civil Practice & Remedies Code § 74.001(a)(21). Specifically, Plaintiffs fail to allege that Defendants are “duly *licensed, certified, registered or chartered* by the State of Texas to provide health care, including: . . . (vii) a health care institution” or “a *licensed* public or private institution to which Chapter 242, Health & Safety Code, applies.” *Id.* [emphasis added].

1.2 A “Health care liability claim” is defined as:

. . . a cause of action against a *health care provider* . . . for treatment, lack of treatment, or other claimed departure from accepted standards of . . . health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant’s claim or cause of action sounds in tort or in contract.

*See* Tex. Civ. Prac. & Rem. Code § 74.001(a)(13)[emphasis added]. Plaintiffs fail to allege that Defendants are “duly *licensed, certified, registered or chartered* by the State of Texas to provide health care.” Therefore, Plaintiffs have failed to state that Defendants are a “health care provider” and, therefore, Plaintiffs have failed to properly state a “Health care liability claim against Defendants.”

1.3 Defendants would show that the operator of a nursing home must be the license holder or controlling person and that there can only be one license holder for a nursing home. *See* Tex. Admin. Code §§ 19.101 (Definitions for “Controlling person” and “Nursing Facility/home”) and 19.201; *See also* Texas Health & Safety Code Chapter 242. Plaintiffs have failed to allege that the Defendants hold a license or other certification, registration or charter. Defendants deny they are license holders, controlling persons, owners or operators of the nursing home in question.

1.4 Plaintiffs have failed to allege that Defendants employed the individual or individuals who owned or operated the nursing home. Plaintiffs have failed to allege that

Defendants employed the individuals or individuals who provided the care and treatment for the nursing home resident Ms. Hawkins, including the alleged negligent acts, errors or omissions of nursing home care and treatment allegedly causing injury, damage and death. Defendants deny they are employers of such individuals.

## **II. DISMISSAL REQUIRED**

2.1 Based on the foregoing, Plaintiffs have failed to state a claim against Defendants upon which relief can be granted. Therefore, Defendants move to dismiss Plaintiffs' claims against Defendants in accordance with Federal Rule of Civil Procedure 12(b)(6).

DEFENDANTS PRAY for the entry of an order granting Defendants' Motion to Dismiss and dismissing Plaintiffs' claims against Defendants; that Defendants recover their costs of court; and that Defendants recover any additional relief to which Defendants are entitled.

Respectfully submitted,

**MACDONALD DEVIN, P.C.**

By: /s/ Gregory N. Ziegler

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**ATTORNEYS FOR DEFENDANTS NEXION  
HEALTH LEASING, INC., NEXION HEALTH  
OF TEXAS, INC., and NEXION HEALTH,  
INC.**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served in accordance with the FEDERAL RULES OF CIVIL PROCEDURE, by e-mail to all parties, on this the 26th day of December, 2013.

/s/ Gregory N. Ziegler

Gregory N. Ziegler / Jason A. Burris